STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

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| TIM EYMAN,<br>Plaintiff,<br>MICHAEL J. PADDEN,<br>Plaintiff Intervenor<br>v.<br>KIM WYMAN, in her capacity as Secretary of State; THE WASHINGTON STATE LEGISLATURE,<br>Defendants,<br>DE-ESCALATE WASHINGTON,<br>Defendant Intervenor. | No. 18-2-01414-34<br>JOINT REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT |

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## INTRODUCTION

The briefs submitted by the parties and amici in opposition to Plaintiff's Motion for Summary Judgment agree on one thing: that when an Initiative to the Legislature is duly certified as having garnered the requisite number of signatures, the Legislature must choose among the three alternatives prescribed by the state Constitution. However, they differ in their assessment of the choice that the Legislature **actually made**. In this reply brief, Plaintiff and Plaintiff Intervenor[1] will demonstrate:

(1) The Legislature did not adopt I-940 "without change or amendment"; if they had, I-940 would become the law of this state. Instead, by adopting I-940 as amended by ESHB 3003, the Legislature enacted an alternative to I-940 and therefore both I-940 and I-940 as amended by ESHB 3003 must be presented to the voters in November 2018; to do otherwise would betray the promise made in the state Constitution that the people retain the power to legislate;

(2) Even if the Legislature, under some circumstances, may first adopt an initiative and then later change the law by simple majority vote, they did not do so in this instance. Further, AGO 1971 No. 5 (January 26, 1971) reinforces, not weakens, Plaintiff's request for relief; and

(3) The objections to the standing of Plaintiff and Plaintiff Intervenor are not well taken.

## I. THE LEGISLATURE HAS PROPOSED A FOURTH OPTION

Despite conceding that the state Constitution gives the Legislature only three options when presented with a duly certified Initiative, the brief submitted by the Legislature asks this Court to create a fourth alternative—in which an Initiative is not placed on the ballot for a vote by the people, but neither does it become the law. The following chart summarizes the three

[1] To avoid repetition, Plaintiff and Plaintiff Intervenor submit this joint Reply brief. While Plaintiff and Plaintiff Intervenor represent distinct interests, they agree on the remedy requested and the reasons supporting the need for that remedy.



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options recognized by the Constitution, along with a fourth column describing what the Legislature claims it may do.

| Option | 1 **Adopt** Initiative | 2 **Ignore** Initiative | 3 Propose **Alternative** | 4 **Adopt then Amend** |
|---|---|---|---|---|
| **What Goes on the Ballot?** | Nothing | Initiative | Initiative + Alternative | Nothing |
| **What law results?** | Initiative | Initiative if approved | Depends on voter choice | Legislature's amended version |

According to the Legislature, because I-940 was adopted and then amended, nothing goes on the ballot, and the amended version of I-940 becomes law. As the brief of amicus Phyllis Bass recognizes,[2] this amounts to a fourth option. But before delving further into the mis-statement of its own actions and the misunderstanding of Article II § 1 advanced by the Legislature, it is useful to review the history and purpose of Article II § 1.

**A. The Constitution Preserves The Right Of The People To Legislate.**

The two houses of the Washington State Legislature have primary responsibility for translating the will of the people into law. WASH. CONST. Art. II § 1. However, the same section of the state Constitution was amended in 1912 to reserve from the Legislature a power of the people themselves to legislate. That power is tightly constrained, and unlike the Legislature's plenary legislative power, allows for no debate, modification, or amendment. If the people choose to act through the initiative process, a single proposed legislative text can be considered, either alone or against an alternative proposed by the Legislature. Though it is an expensive and arduous process to compose an initiative and secure sufficient signatures to qualify it for direct approval or rejection by the voters themselves, the Constitution anticipates the likelihood that, from time to time, the people may be sufficiently frustrated with the failure of the Legislature to translate their preferences into law that they exercise the right guaranteed

[2] Brief of Amicus Curiae Phyllis Bass, 9:7-12.



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to them by Article II § 1. When they do so, the constitutional text and structure limit the scope of the Legislature's authority, and protect the real possibility that the text of the initiative can ***become*** and ***remain*** law.

**B. An Initiative Will Either Be Adopted Or Will Be Included On The Ballot.**

In order to give meaning to the right of the people to legislate, Art. II § 1(a) requires the Legislature to choose one of the three options open to it. One choice (adoption without change or amendment) allows the policy proposed in the Initiative to become law. The other two options (rejection or proposing an alternative) guarantee that the people will be given the chance to legislate—to make their policy preferences the law of the land—if a majority of voters approve the initiative at the polls. By confining the Legislature to the three options specified in Article II § 1, the Constitution guarantees that those who take the trouble to compose an initiative and then obtain sufficient signatures to have it certified know that their efforts result in the possibility that the initiative ***becomes*** and ***remains*** the law of the state.

**C. The Fourth Option Would Render The Initiative Process A Futile Exercise.**

The Legislature has proposed an interpretation of Art. II § 1 that permits the Legislature a fourth option— exercising the Legislature's plenary legislative power in order to amend an initiative prior to adopting it. Part II of this Reply Brief discusses the procedure that the Legislature followed in this particular case, and the significance of the sequence in which I-940 and ESHB 3003 were voted on. But the Legislature argues that the procedure followed in this particular case is of no significance,[3] because the relief requested by the Plaintiff is an unconstitutional limitation on the Legislature's plenary power to legislate.

[3] "The difference between what the Legislature did here and what it could have done simply by reconvening is meaningless; the Constitution cannot be read to mandate meaningless waiting." Brief of the Legislature, 8:15-17. Far from being meaningless, the timing of the passage of I-940 and ESHB 3003 is critical to this case, as Section II of this brief demonstrates.



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The relief requested by the Plaintiff in no way constrains the Legislature except to the extent required by the Constitution.[4] The relief requested by the Plaintiff is a writ of mandamus to be issued to the Secretary of State to place both measures on the ballot, as required by the Constitution. The Plaintiff is not asking this Court to constrain the Legislature's power to legislate, but rather to apply the Constitution in such a way as to protect the exercise of the people's carefully limited, reserved power to legislate. If adopted, the Legislature's reading of Article II § 1 would protect it from being constrained by the people's reserved legislative right.

Contrary to the claim advanced by the Legislature, the Plaintiff is placing no restriction on the Legislature's "plenary power to enact laws."[5] Rather, what is at stake in this case is the **effect** of the Legislature's choice to first amend, and then vote in favor of I-940 as amended. The only constitutionally permissible consequence of exercising that choice is to trigger the requirement that both the initiative and the amended version be placed on the ballot. The Legislature disputes this claim, arguing in effect that they can have their cake and eat it too—they can scuttle the right of the people to vote on a duly certified initiative, but they can also ensure that the amended version of the initiative that they prefer will become the law of the land, with no chance that the initiative text will become and remain law, and no possibility that the people may exercise their retained legislative power to vote in favor of either the status quo, or the initiative, or the Legislature's preferred alternative.

The Legislature offers no explanation as to the why Article II § 1 specifies that in order to exercise option 1—to adopt the initiative as its own—the Legislature must pass the initiative

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[4] It is true that, in addition to requiring both measures to be placed on the ballot, the relief requested by the Plaintiff would postpone the effective date of I-940 as amended by ESHB 3003 until after the people have voted in November, but this is a limitation imposed directly by the Constitution itself. WASH. CONST. Art. II § 1(a).

[5] Brief of Defendants Legislature and State of Washington, 6:9-10, quoting *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 289, 174 P.3d 1142 (2007).



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"without change or amendment."[6] If the drafters of the Constitution anticipated that an initiative could first be changed or amended at will by the Legislature, and then be "adopted," the language "without change or amendment" has no meaning whatsoever. If the initiative process were simply a glorified form of suggesting legislation for the Legislature to do with it as it saw fit, then "improvements" by the Legislature should be welcome rather than forbidden. Instead, the Constitution anticipates precisely the situation that is presented here—that the Legislature would find some features of the initiative to its liking but would prefer a number of changes that it believed would "improve" the initiative. As pointed out previously, the Constitution reserves to the people a carefully limited right to legislate because it is likely that, from time to time, what the Legislature believes is preferable public policy will be unsatisfactory to a significant number of the voting public. Thus, to ensure that the proponents of an initiative are protected against the Legislature "improving" the initiative without consent of the people, the Constitution gives the Legislature only three choices: adopt the initiative without change or amendment, or else reject it, either without an alternative or with the Legislature's preference as an alternative so that the people can decide for themselves which they prefer.

As pointed out by amicus Phyllis Bass, if there is any doubt as to how the constitutional provisions at issue here should be interpreted, the duty of Washington courts is to construe the provisions of Art. II § 1 in favor of preserving the right of the people to legislate.[7] If the rule proposed by the Legislature were adopted, it would hardly be a "liberal construction" of the

[6] WASH. CONST. Art. II § 1(a).

[7] Brief for Amicus Phyllis Bass, 14:8-12, citing *Andrews v. Munro*, 102 Wn.2d 761, 689 P.2d 399 (1984).



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right guaranteed by the construction; instead, it would result in the initiative process becoming what *Hoppe* warned would be a "futile exercise."[8]

**D. The Defendants' Proposed Rule Is Not Limited To "Friendly" Amendment.**

Despite some references to the cooperation between members of the ballot committee organized to favor I-940 and the final version of I-940 as amended by ESHB 3003,[9] the Legislature does not suggest that its proposed rule is limited to exceptional cases. Quite the contrary. The justification for treating ESHB 3003 as an ordinary amendment of existing law is that the Legislature possesses plenary power to legislate, and thus this or any restriction on that power would be unconstitutional. While the Legislature acknowledges the possibility that this supposedly unrestrained power might be misused, the Legislature would place the burden on those who demand the relief sought in this case to prove that the Legislature had engaged in "an attempt to frustrate the original initiative."[10] The Legislature does not identify a constitutional source for its right to amend an initiative prior to voting on whether to adopt it, especially in the face of an explicit ban on that action. Nor does it explain why the burden of meeting the newly invented "attempt to frustrate" standard should fall on citizen litigants rather than burden the Legislature to show why it was not obligated to follow the prescribed

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[8] *Washington State Dept. of Revenue v. Hoppe*, 82 Wn.2d 549, 557, 512 P.2d 1094, 1099 (1973).

[9] The Solicitor General asserts that "the Legislature enacted ESHB 3003 to refine the policy of the original initiative not to subvert the process." Brief of the Defendants Legislature and State of Washington, 10:4-5; De-Escalate Washington likewise assures the Court that ESHB 3003 "will preserve the policy goals and objectives of I-940." Brief of De-Escalate Washington, 8:26-9:1. Finally, the Washington Association of Sheriffs and Police Chiefs states, "These amendments [in ESHB 3003] were supported both by a broad coalition of law enforcement agencies and the initiative sponsors because they improve the initiative, and will result in clearer standards for law enforcement and increased protections for citizens involved in deadly force confrontations." Brief of WASPC, 4:19-22.

[10] Brief of the Legislature, 8:22-23. It should be noted that the Legislature in proposing amendments to an initiative would operate in the belief that they were improving it, rather than frustrating its overall purpose. It is also likely that some who supported the original initiative would agree with what the Legislature had done while others would disagree—precisely the circumstance evident in this case.



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constitutional procedure. In fact, the constitutional text and structure gives them no basis for invoking supposed cooperation of certain prominent former proponents of I-940. The initiative process, once undertaken, is an extraordinarily constrained form of legislative power. Unlike the plenary legislative power, it allows for no amendment, debate, cooperation, or other forms of legislative give-and-take normal action within elected representative bodies. After a final initiative text has been filed with the Secretary of State, and sufficient voters sign in favor of certifying it to the Legislature, the Legislature's role in "improving" it must include submitting both the original and proposed improvements to the people for a vote. No one, not even the individual who filed the original text, has the constitutional right to revoke the people's legislative power once it has been properly invoked.

## II. THE CONSTITUTION MANDATES A SEQUENCE OF EVENTS

The Constitution constrains the Legislature, once an initiative qualifies, to act in a set sequence. That sequence has practical, real-world effects. It ensures that the limited scope of the people's legislative authority to present one and only one possible legislative text is honored, in that the initiative text always has the possibility of ***becoming*** and ***remaining*** law. The Legislature's concocted fourth option removes that possibility, thereby undoing the people's reserved legislative authority.

### A. The Legislature Mis-States The Sequence Of Legislative Action

Although the Legislature claims that the parties agree on the relevant facts, its entire justification for securing its preferred policies on police use-of-force without seeking voter approval depends on a transparently false assumption: that the Legislature first adopted and later amended I-940. The true facts, undisputed and undisputable and admitted in the Legislature's Answer, is that the Legislature first passed ESHB 3003, which on its face explicitly amends I-940, and secured the governor's signature on it, before voting to enact I-940 subject to the previously agreed amendment of ESHB 3003. The Legislature suggests that the time delay between the adoption of an initiative and a subsequent amendment is



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"meaningless,"[11] but contrary to its arguments, it is of absolute constitutional significance. The question of timing is equally important in disposing of intervenor De-Escalate Washington's attempt to re-write the text of an initiative that 360,000 Washington voters signed at its request.

**B. The Initiative Process Constrains Both The People And The Legislature**

While the Legislature makes much of its plenary power to legislate, its authority, like that of the people when legislating directly, is carefully limited to avoid potential conflict and ensure that the initiative process, once properly invoked, cannot be undermined by the Legislature. The people are constrained by the requirement that the first compose an initiative, then collect signatures in favor of the initiative, without any opportunity to amend it mid-course. This is part of the plenary legislative power that the Legislature may exercise in the absence of a constraining initiative. However, after the people have composed an initiative and collected the minimum number of signatures, the Legislature is in turn constrained by what it may do in response, as demonstrated above.

While the single most relevant pair of events – and timing – is the Legislature's decision to ***first*** amend I-940 by ESHB 3003 and ***second*** to vote on I-940 itself, the events that trigger constitutional constraints on the Legislature started earlier, when Leslie Cushman finalized the text of I-940 months prior to the 2018 session, and 360,000 Washingtonians signed that initiative prior to the opening of the 2018 session.

**C. The Constitution Prescribes The Permissible Sequence Of Events**

By exercising their reserved initiative power prior to the 2018 session, the people constrained the scope of legislative authority the Legislature could exercise in the 2018 session. The Legislature could continue to do nothing, as it had in previous sessions. Unlike previous sessions, however, inaction would necessarily result in I-940 appearing on the November ballot for approval by the voters. If approved, the 2019 and 2020 Legislatures would

[11] Brief of the Legislature, 8:16.



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be unable to alter Washington's use-of-force law except with a 2/3 supermajority in both houses. Similarly, the Legislature could consider, evaluate, and reject I-940, again with the result that the voters would have the opportunity in November to "reject the rejection" and vote to approve I-940. Finally, it could adopt I-940 "without change or amendment," Const. Art. II sec. 1(a), and allow it to become positive law of the state. Thus, the people's exercise of their reserved initiative power had, by January 2018, constitutionally constrained the Legislature. Among the constitutional constraints included that, if the Legislature wanted to amend I-940, it could only do so after first adopting it "without change or amendment." It recognized this constraint and went to unprecedented lengths to evade it, by first voting in favor of amendments to I-940, seeking and securing the Governor's signature, and only then voting on I-940 itself.

**1. The "Take Precedence" Mandate Bars The Reversed Voting Order.**

The Legislature's decision to reverse the mandatory order of action on ESHB 3003 and I-940 violates both portions of the mandate in Art. II § 1(a) regarding treatment of certified initiatives: that they "shall take precedence over all other measures in the legislature except appropriation bills and be enacted without change or amendment . . ." While the "takes precedence" clause cannot require the Legislature to act affirmatively on any initiative prior to acting on other bills – else how could it reject an initiative by inaction, a course plainly permitted by the Constitution – this clause works together with the immediately following "without change or amendment" clause to forbid the very dodge attempted by the 2018 Legislature, where ESHB 3003 took precedence over I-940. By first considering, debating, and voting in favor of amendments to I-940, and securing gubernatorial approval, then only after all that, subsequently voting on I-940, the Legislature allowed ESHB 3003 to take precedence over I-940.[12]

[12] The Court need not consider any question regarding the scope or judicial enforceability of the "take precedence" clause beyond the sole question in this case: can the Legislature first



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**2. The Legislature Amended First and Adopted Later.**

The Legislature repeatedly claims that it adopted ***then*** amended I-940. It did not. No legislator voted on I-940 until she was 100% certain that the substantive amendments contained in ESHB 3003 had already been approved by both houses and signed by the Governor. While the Legislature would like the Court to agree that the order of actions taken by the Legislature is of no moment, its own actions demonstrate the opposite. As the Constitution anticipates, the Legislature was required by the Secretary's qualification of I-940 to confront the very real possibility that I-940, exactly as drafted, might become and remain positive law. It might become positive law because the people vote to adopt it, or it might become positive law because the Legislature votes to adopt it. If the Legislature had first voted to adopt it, the risk would have immediately arisen that the Legislature might no longer have a majority of members in one or both houses who desire to amend it, or that, even with two majorities, gubernatorial approval of a later-in-time amendment would not be forthcoming, leaving I-940 adopted and unamended. The Legislature's decision to first amend, then vote on I-940, contrived to eliminate the risk that I-940 could ever become and remain law. It is no accident that the vote and signature on ESHB 3003 preceded the vote on I-940. The Legislature's timing was expressly designed to avoid the choice that it was constrained by the Constitution to face as soon as I-940 was certified to it: that the text of the initiative could become law as written.

**3. The Constitutionally Mandated Timing Has Practical Effect.**

The Legislature and *amicus* WASPC rely heavily on a sentence in the 1971 Attorney General Opinion No. 5 (AGO 1971 No. 5) that contemplates circumstances under which the Legislature may amend an initiative after it has adopted it.[13] That opinion, however,

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vote on a bill amending an initiative prior to voting on the initiative itself? Coupled as it is with the "without change or amendment" language, the answer must be "no."

[13] 1971 AGO No. 5, answers to Questions 9 and 10 (original page 13).



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demonstrates that the Legislature's decision to ignore the basic constitutional requirement that the Legislature first adopt the initiative, then amend it, has significant practical effect both on the votes of the Legislature and on the opportunity for votes by the people.[14]

After an initiative has been certified to the Legislature, the Legislature's otherwise plenary authority to pass legislation is qualified and constrained in important respects by the people's invocation of and exercise of their initiative power. It can no longer simply adopt its preferred policy against the background of existing law as though the initiative does not exist – the much-touted exercise of plenary authority from the Legislature's brief. Instead, if it adopts legislation dealing with the same subject[15] as an initiative that has been submitted to it, then the Secretary of State must submit both the initiative and the conflicting legislation to the people for a vote.

Again, as noted above, the Legislature was free at all times to adopt its own preferences as an exercise of its plenary legislative authority in any session prior to 2018, but at the moment the 2018 session opened, with I-940 qualified by virtue of 360,000 signatures, the Constitution constrains the Legislature's choices by requiring action or inaction in a specific order, established to insure that the people's initiative, as drafted and without amendment, are given the opportunity both to ***become*** as well as to ***remain*** the state's new law. The Legislature is obligated to follow this procedure in order to ensure that the people retain their reserved initiative power.

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[14] All parties agree that at some point in time after it votes to adopt an initiative, the Legislature can vote to amend it. As discussed below, there are important questions concerning (1) how much time must elapse and (2) whether the 2/3 majority requirement applies. However, because the Legislature never adopted the initiative "without change or amendment," this Court need not reach that issue.

[15] The Legislature may or may not be aware that legislation it adopts addresses the same subject as the subject addressed by an initiative. For example, in the *Hoppe* case, the Washington Supreme Court found that the legislature had passed a conflicting statute under a "misconstruction" of the effect of its legislation.



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Because the Legislature amended first and voted on the initiative after, this case does not raise the question of the constitutionally minimum period of delay between the Legislature first adopting an initiative and later amending it by simple majority, addressed in AGO 1971 No. 5. However, should the Court credit at all the Legislature's argument that it "adopted then amended," AGO 1971 No. 5 correctly concludes that the 90 day period for potential referendum must pass between initiative adoption and majority vote amendment. This delay preserves the right of the people, after an initiative has qualified, to vote on the potential alternative states of the law. In the 90 days after the Legislature's adoption of the initiative, the people's referendum can reverse the Legislature and revert to the original status quo. Once that time has passed, the Legislature is free to amend, in the exercise of its plenary legislative power. And after that, the people can then act as a referendum on the amendment, and vote to reject the amendment in order to retain the initiative text as law. In this manner, the Constitution enforces the same post-qualification constraints on the Legislature to ensure the possibility that the initiative text ***becomes*** and ***remains*** law. This delay is not meaningless, form-over-substance, and in fact the Legislature's actions, if allowed to stand, have had the practical effect (and would have the effect in future cases) of not only doubling the effort of securing the initiative as law, but of irrevocably clouding the distinct questions the Constitution puts to the people once an initiative qualifies: Status quo, initiative, or alternative.[16]

**4. The Constitution Creates And Enforces The Possibility Of A Qualified Initiative Becoming and Remaining Law.**

As noted above, the three constitutionally permitted actions of the Legislature each may result in a certified initiative becoming law as drafted, in exactly the form presented to voters for signature. If the Legislature rejects the initiative, whether by vote or by inaction, the

[16] Again, while the present case does not require the Court to address the question, it is quite plain that it is in practical effect impossible to craft a referendum, regardless of time constraints, that would allow voters to select reversion to the status quo of current law, or select the enactment of I-940 as drafted.



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initiative is presented to the voters to decide whether to change the state's law as proposed in the initiative. Similarly, if the Legislature proposes an alternative, the voters are presented with two choices: first, whether to change the law at all, and second, which of two options for change the voters prefer. Thus, because the initiative qualified by virtue of sufficient signatures, when it appears on the ballot, the election can result in (1) the law remaining unchanged; (2) the law changing to the initiative; or (3) the law changing got the Legislature's alternative.

The constitutionally established order and timing for the Legislature to first ***adopt*** and only then attempt to ***amend*** a certified initiative is a constraint imposed that limits the Legislature's plenary authority to ensure that the same three possibilities actually exist, including that the people's proposed policy ***becomes*** and ***remains*** law. Obviously, the Legislature may ignore or reject the initiative, in the hope that the people do the same and the law remains unchanged. But if it votes to adopt the initiative, it must first secure a majority of members of both chambers who desire to change existing law to become the law proposed in the initiative. Only then, after adopting the initiative without change or amendment, can the Legislature then propose amendment and attempt within its ranks to secure a majority of members of both chambers who desire to change the new status quo (the law as amended by initiative) to a third policy position, along with gubernatorial approval. This subsequent amendment effort could fail, leaving the required possibility that the initiative ***becomes*** and ***remains*** the law of the state.

By repeatedly claiming it adopted then amended the initiative, the Legislature pretends that the vote on amending I-940 came after the vote on adoption. It also pretends that the timing does not matter, as though the voting coalition to change use-of-force law would have been exactly the same if members voting on I-940 faced the prospect that their vote could actually enact I-940 as written. After all, any member who preferred I-940 to either the status quo ***or*** the law of ESHB 3003 would vote first ***aye*** on I-940 then ***nay*** on ESHB 3003. Once the status



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quo is permanently altered by adopting an initiative, the subsequent vote to amend it is a proposed change to a different baseline of the law. Perhaps I-940 alone could not have secured majority approval had it properly been presented first, because members who wanted the ultimate policy of ESHB 3003 did not trust their colleagues to amend it after adopting it – yet also feared that the voters themselves would adopt I-940 if nothing were done or the alternatives were presented to them as required. By reversing the sequence, and ignoring the Constitution, the Legislature contrived to avoid the risk of the Legislature's pro-ESHB 3003 coalition collapsing after enactment of I-940, as well as the risk that the people would adopt I-940 instead of ESHB 3003.

**5. The Legislature Did Not Adopt I-940 Without Amendment.**

The Legislature first voted to amend I-940, and voted to guarantee that those amendments took effect upon adoption of I-940. Only thereafter did it vote on I-940. It now claims that because the text it voted on did not itself contain strikethroughs and additions, it voted to enact I-940 "without change or amendment." That is simply untrue as a practical matter. The effect of their actions to the future state of the Revised Code of Washington, according to the Legislature, is to enter into the RCW I-940 as amended by ESHB 3003, without a vote of the people, where the amendments in ESHB 3003 were approved earlier in time than the vote on I-940. Thus, it voted to enact I-940 only with amendment, and only after amendment, and only contingent on amendment. To argue otherwise ignores the passage of time, and the possibility that votes held in reverse order could have had different outcomes, or could have failed to secure required gubernatorial approval as to ESHB 3003, if I-940 had already been adopted. Every legislature who voted in favor of I-940 did so secure in the knowledge that the policies proposed by the people would not, and could not, ***become*** and ***remain*** state law. In other words, the Legislature voted to adopt I-940 with amendment.

Intervenor De-Escalate Washington agrees with counsel for the Legislature as to the legal effect of the Legislature's actions, claiming that I-940 as amended will become the law of the



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land on June 9, 2018. However, it urges that if some flaw is found in ESHB 3003, the Court should rule that I-940 became the law when it was "adopted" on March 8, 2018. But of all the conclusions that this Court could draw as to what the Legislature actually did, this is perhaps the least plausible. The Constitution permits an initiative to become law without the Governor's signature or without a vote of the people—an extraordinary departure from the checks and balances applied to most legislation—but it is conditioned on adoption "without change or amendment" by both houses of the Legislature. For whatever reason - whether because it feared I-940 would become law by a vote of the people, or that it could no longer secure a majority of both chambers and gubernatorial signature to amend after adoption – the Legislature absolutely did not adopt I-940 without change or amendment. To claim otherwise requires one to act as though the debate and votes on ESHB 3003 did not occur.[17]

**6. A Special Session Had Serious Political Ramifications.**

The Legislature asks this Court to bless its disregard for the constitutionally mandated timing by claiming both that the alternative required a special session, and that a rule that would have required the governor to call for such a special session exalts form over substance. First, the Court need not reach the question addressed in AGO 1971 No. 5 about how much time must pass between the legislature adopting an initiative and amending it by simple majority vote. No time passed at all, because the Legislature never adopted the initiative without change or amendment as constitutionally required. But even if the facts of this case could be rearranged to characterize the vote on I-940 as an adoption, the Legislature is correct that the proper, constitutionally mandated sequence would have required a special session. That is hardly form over substance. Quite the contrary, where leaders of both parties repeatedly

[17] The constitutional moment for the leadership of De-Escalate Washington to agree or disagree with changes to I-940 terminated when it finalized the text and began soliciting signatures. It cannot speak for the hundreds of thousands of voters who signed the petition leading to the certification of I-940 to the legislature. Once an initiative is certified to the Legislature, the constitutional baton passes to the Legislature to choose one of the three options specified in the Constitution.



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assured their voters that in 2018, for the first time in years, the Legislature would adjourn on time, with no special session.[18] The Legislature disregarded the minimum constitutional mandate – adopt then amend – in order to guarantee that I-940 could not become and remain state law, but instead that its preferred policy expressed ESHB 3003 would become state law, and at the same time that it could avoid the political embarrassment of reneging on a promise to voters that it would not require a special session in 2018.

## III. BOTH PLAINTIFF AND PLAINTIFF INTERVENOR HAVE STANDING AND THIS CASE IS JUSTICIABLE

### A. The Secretary Of State Does Not Challenge Standing Or Justiciability.

The only objection to the standing of the Plaintiff or Plaintiff Intervenor comes from a party against whom no relief is sought—the Legislature. While it is true that a lack of standing or justiciability cannot be waived—a court may *sua sponte* decline to decide a case if it lacks subject matter jurisdiction,[19] it is significant that the Secretary of State not only does not challenge the Plaintiff's standing, but affirmatively requests a determination by this court of the merits of this controversy,[20] providing ample authority for the court to do so.

### B. The Plaintiff Does Not Seek A Finding Of Unconstitutionality.

This case differs significantly from those cases (including the one on which the Legislature principally relies[21]) in which the plaintiff asks the Court to declare a statute or an action of state government unconstitutional. In such cases the standing requirements are heightened in order to insure that the sweeping effect of a finding by the court (holding the

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[18] *See, e.g.*, Orenstein, *Four storylines to watch in Olympia during the 2018 legislative session*, The News Tribune, available at http://www.thenewstribune.com/news/politics-government/article193183004.html (last accessed April 16, 2018).

[19] For example, *In re Recall of West*, 156 Wn.2d 244, 126 P.3d 798 (2006).

[20] Brief of the Secretary of State, 3:13-6:14.

[21] *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149 (2001) (constitutionality of dealer licensing statute.



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statute constitutional or unconstitutional) is litigated by parties who have a sufficient stake in the outcome both to justify their intervention and to insure that the case is properly decided.

By contrast, in this case the relief sought by Plaintiff is much more limited: he asks that this Court declare that (1) I-940 as amended by ESHB 3003 constitutes an alternative measure as described in Article II § 1, and (2) consequently, neither I-940 nor ESHB 3003 will become law unless and until one or the other is approved by the voters.

As a result, the heightened standing rules for constitutional challenges applied in cases like *To-Ro Trade Shows* do not apply here. To be sure, the Plaintiff pleads for the *application* of the Constitution to the actions of the Legislature, triggering a duty on the part of the Secretary of State to place both measures on the ballot, but the Plaintiff does not seek a determination by this Court that any statute or action already taken by a governmental body is unconstitutional.

**C. Liberalized Standing Rules Apply To This Case.**

As the brief filed by the Secretary of State recognizes,[22] the standing rules that ordinarily apply to limit the subject matter jurisdiction of the court are relaxed in cases of "broad overriding public import." *Lee v. State*, 185 Wn.2d 608, 618, 374 P.3d 157, 162 (2016) (internal quotation marks omitted). Plaintiff easily satisfies the test, as outlined in the Secretary of State's brief.

**D. Plaintiff And Plaintiff Intervenor Have Standing Under Any Standard.**

The Legislature asks the Court to apply a more rigorous test for standing than the one that, as the Secretary of State points out, applies to this case. However, even under that more rigorous standard, the Plaintiff and Plaintiff Intervenor have standing. The Legislature concedes two of the elements of standing identified in the *To-Ro Trade Shows* case, but claims that neither the Plaintiff nor Plaintiff Intervenor can satisfy element #1 (an "actual, present and

[22] Brief of the Secretary of State, 3:13-5:16.



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existing dispute") and element #3 ("interests that are direct and substantial"). Both claims are unavailing.

**1. There Is An Actual, Present And Existing Dispute.**

As demonstrated by the conflicting views presented by the parties and amici in this case, there is an actual, present and existing dispute over the effect of the Legislature's adoption of I-940 as amended by ESHB 3003. Some claim that I-940 will become the law in June and that ESHB 3003 has no effect because it was invalid. Others claim that I-940 as amended by ESHB 3003 will become the law in June. Plaintiff claims that neither I-940 nor the amended version will become law unless and until the voters approve one of them. There is nothing theoretical about these competing claims, or the desire of the respective parties and amici to know what law will be applied to police conduct in June 2018.

In addition, the Legislature claims the plenary power to adopt an initiative and then amend it at will, without referring either matter to the people for a vote, subject only to a narrow exception that would require a determination that the Legislature was attempting to "frustrate the original initiative." By contrast, the Plaintiff seeks a determination that, if the Legislature chooses to amend and then "adopt" an initiative submitted to it by the people, it may do so only with the stipulation that both the original version and the amended version are submitted to the people for their approval or rejection. The resolution of this issue is not an abstract or theoretical question; as the Secretary of State points out, she must decide (and decide soon) what will be printed on the millions of voter's pamphlets and ballots mailed out to Washington voters.

**2. Failure To Provide Relief Will Injure Direct And Substantial Interests.**

The Legislature also denies that either Eyman or Padden has an interest that would suffer an injury that is direct and substantial if the requested relief is not granted. But the interests of Plaintiff and Plaintiff Intervenor are clear. It is undisputed that Eyman has invested considerable time and reputation in promoting initiatives. As has been demonstrated in



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previous sections of this brief, the rule proposed by the Legislature (which would apply if the relief requested by Plaintiff is not granted) would effectively eliminate the initiative to the Legislature as a viable means for the people to legislate. While an initiative to the people would still be a means by which the people could still exercise their power to legislate, prudence would require abandoning the initiative to the Legislature in light of the risk that the Legislature could render it a "futile exercise" by employing the "amend then adopt" strategy. Losing one of the two constitutional avenues to exercise the right of the people to legislate would be a direct and substantial injury to Eyman.

This injury is hardly speculative. Eyman has sponsored multiple initiatives for which he is now soliciting signatures in the hopes of certifying them to the legislature for the 2019 session. One, for $30 car tabs, raises concerns strikingly similar to I-940: a topic on which the legislators of the 2018 session often promised action, but on which none was taken. No proposal put forward by a legislator in 2018 was identical to Eyman's initiative proposal, and his ability to secure signatures is directly hampered by the present threat that the Legislature's novel disposition of I-940 will be repeated to render the initiative text meaningless upon presentment. Similarly, he is sponsoring an initiative that challenges the Legislature's claimed prerogative to remain exempt from the Public Records Act – surely a topic on which the Legislature would prefer not to act, and one on which, if confronted with an initiative, the institution is likely to repeat its "amend then adopt" tactic if permitted to do so.

Similarly, Senator Padden would suffer a direct and substantial injury if all future initiatives were initiatives to the people directly. The current option of proposing initiatives to the Legislature offers the legislative bodies an opportunity to improve the legislation, as this case illustrates.[23] Although those who sponsor initiatives and the members of the Legislature

[23] As he stated when this legislation was being considered, Senator Padden considered the amendments contained in ESHB 3003 to be improvements on I-940. Nonetheless, as the previous sections of this brief point out, this is no justification for bypassing the constitutionally prescribed procedure.



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may differ in their perceptions of the public good—a difference that led to the inclusion of the provisions of Article II § 1—these differences may lead to constructive dialogue. Senator Padden would suffer a direct and substantial injury if an initiative process that included the Legislature were effectively eliminated.

**E. This Dispute Is Justiciable.**

The Legislature further argues that the Plaintiff cannot be granted the relief requested because it would require this court to "craft legislation."[24] But the opposite is true. The court is not being asked to write legislation; it is only being asked to order the Secretary of State to place on the ballot both I-940 and what the Legislature actually passed, which is I-940 as amended by ESHB 3003. ESHB 3003 is simply a series of amendments that, when applied to I-940, constitute an alternative. The actual text of the substance of I-940 as amended by ESHB 3003 is contained in the amendment proposed by Senator Padden as Amendment 956, attached as Exhibit A. Although it was not adopted, this was not because of any disagreement with its content; rather, those who voted against the amendment were convinced that they could avoid the necessity of submitting both I-940 and the amended version to the voters.

The relief requested by the Plaintiff does not require the Court to legislate. Moreover, as with the issue of standing, the only party objecting on the basis of justiciability is not the object of any requested relief.

## IV. CONCLUSION

The Legislature, in defiance of the Constitution, first voted to amend the qualified initiative I-940. It only voted on the initiative with the assurance it would never become and remain law. The Constitution forbids this, and the only plausible, permissible alternative is that the Legislature proposed an alternative. This Court should direct the Secretary of State to put both I-940 and the alternative on the ballot in November.

[24] Brief of the Legislature, 12:8.



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DATED this 17th day of April, 2018.

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# Ex. A

**ESHB 3003** - S AMD **956**
By Senator Padden

**NOT ADOPTED 03/08/2018**

Strike everything after the enacting clause and insert the following:

"**PART I**
**TITLE AND INTENT**

NEW SECTION. **Sec. 1.** This act may be known and cited as the law enforcement training and community safety act.

NEW SECTION. **Sec. 2.** The intent of the people in enacting this act is to make our communities safer. This is accomplished by requiring law enforcement officers to obtain violence de-escalation and mental health training, so that officers will have greater skills to resolve conflicts without the use of physical or deadly force. Law enforcement officers will receive first aid training and be required to render first aid, which will save lives and be a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts. Finally, the initiative adopts a "good faith" standard for officer criminal liability in those exceptional circumstances where deadly force is used, so that officers using deadly force in carrying out their duties in good faith will not face prosecution.

**PART II**
**REQUIRING LAW ENFORCEMENT OFFICERS TO RECEIVE VIOLENCE DE-ESCALATION TRAINING**

NEW SECTION. **Sec. 3.** A new section is added to chapter 43.101 RCW to read as follows:

(1) Beginning one year after the effective date of this section, all law enforcement officers in the state of Washington must receive violence de-escalation training. Law enforcement officers beginning employment after the effective date of this section must successfully

complete such training within the first fifteen months of employment. The commission shall set the date by which other law enforcement officers must successfully complete such training.

(2) All law enforcement officers shall periodically receive continuing violence de-escalation training to practice their skills, update their knowledge and training, and learn about new legal requirements and violence de-escalation strategies.

(3) The commission shall set training requirements through the procedures in section 5 of this act.

## PART III
## REQUIRING LAW ENFORCEMENT OFFICERS TO RECEIVE MENTAL HEALTH TRAINING

NEW SECTION. **Sec. 4.** A new section is added to chapter 43.101 RCW to read as follows:

(1) Beginning one year after the effective date of this section, all law enforcement officers in the state of Washington must receive mental health training. Law enforcement officers beginning employment after the effective date of this section must successfully complete such training within the first fifteen months of employment. The commission shall set the date by which other law enforcement officers must successfully complete such training.

(2) All law enforcement officers shall periodically receive continuing mental health training to update their knowledge about mental health issues and associated legal requirements, and to update and practice skills for interacting with people with mental health issues.

(3) The commission shall set training requirements through the procedures in section 5 of this act.

## PART IV
## TRAINING REQUIREMENTS SHALL BE SET IN CONSULTATION WITH LAW ENFORCEMENT AND COMMUNITY STAKEHOLDERS

NEW SECTION. **Sec. 5.** A new section is added to chapter 43.101 RCW to read as follows:

(1) Within six months after the effective date of this section, the commission must consult with law enforcement agencies and community stakeholders and adopt rules for carrying out the training

requirements of sections 3 and 4 of this act. Such rules must, at a minimum:

(a) Adopt training hour requirements and curriculum for initial violence de-escalation trainings required by this act;

(b) Adopt training hour requirements and curriculum for initial mental health trainings required by this act, which may include all or part of the mental health training curricula established under RCW 43.101.227 and 43.101.427;

(c) Adopt annual training hour requirements and curricula for continuing trainings required by this act;

(d) Establish means by which law enforcement officers will receive trainings required by this act; and

(e) Require compliance with this act's training requirements.

(2) In developing curricula, the commission shall consider inclusion of the following:

(a) De-escalation in patrol tactics and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence;

(b) Alternatives to jail booking, arrest, or citation in situations where appropriate;

(c) Implicit and explicit bias, cultural competency, and the historical intersection of race and policing;

(d) Skills including de-escalation techniques to effectively, safely, and respectfully interact with people with disabilities and/or behavioral health issues;

(e) "Shoot/don't shoot" scenario training;

(f) Alternatives to the use of physical or deadly force so that de-escalation tactics and less lethal alternatives are part of the decision-making process leading up to the consideration of deadly force;

(g) Mental health and policing, including bias and stigma; and

(h) Using public service, including rendering of first aid, to provide a positive point of contact between law enforcement officers and community members to increase trust and reduce conflicts.

(3) The initial violence de-escalation training must educate officers on the good faith standard for use of deadly force established by this act and how that standard advances violence de-escalation goals.

(4) The commission may provide trainings, alone or in partnership with private parties or law enforcement agencies, authorize private parties or law enforcement agencies to provide trainings, or any combination thereof. The entity providing the training may charge a reasonable fee.

## PART V
## ESTABLISHING LAW ENFORCEMENT OFFICERS' DUTY TO RENDER FIRST AID

NEW SECTION. **Sec. 6.** A new section is added to chapter 36.28A RCW to read as follows:

(1) It is the policy of the state of Washington that all law enforcement personnel must provide or facilitate first aid such that it is rendered at the earliest safe opportunity to injured persons at a scene controlled by law enforcement.

(2) Within one year after the effective date of this section, the Washington state criminal justice training commission, in consultation with the Washington state patrol, the Washington association of sheriffs and police chiefs, organizations representing state and local law enforcement officers, health providers and/or health policy organizations, tribes, and community stakeholders, shall develop guidelines for implementing the duty to render first aid adopted in this section. The guidelines must: (a) Adopt first aid training requirements; (b) address best practices for securing a scene to facilitate the safe, swift, and effective provision of first aid to anyone injured in a scene controlled by law enforcement or as a result of law enforcement action; and (c) assist agencies and law enforcement officers in balancing the many essential duties of officers with the solemn duty to preserve the life of persons with whom officers come into direct contact.

## PART VI
## ADOPTING A "GOOD FAITH" STANDARD FOR LAW ENFORCEMENT OFFICER USE OF DEADLY FORCE

**Sec. 7.** RCW 9A.16.040 and 1986 c 209 s 2 are each amended to read as follows:

(1) Homicide or the use of deadly force is justifiable in the following cases:

(a) When a public officer applies deadly force ((~~is acting~~)) in obedience to the judgment of a competent court; or

(b) When necessarily used by a peace officer meeting the good faith standard of this section to overcome actual resistance to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty((~~.~~)); or

(c) When necessarily used by a peace officer meeting the good faith standard of this section or person acting under the officer's command and in the officer's aid:

(i) To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;

(ii) To prevent the escape of a person from a federal or state correctional facility or in retaking a person who escapes from such a facility; ((~~or~~))

(iii) To prevent the escape of a person from a county or city jail or holding facility if the person has been arrested for, charged with, or convicted of a felony; or

(iv) To lawfully suppress a riot if the actor or another participant is armed with a deadly weapon.

(2) In considering whether to use deadly force under subsection (1)(c) of this section, to arrest or apprehend any person for the commission of any crime, the peace officer must have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or a threat of serious physical harm to others. Among the circumstances which may be considered by peace officers as a "threat of serious physical harm" are the following:

(a) The suspect threatens a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening; or

(b) There is probable cause to believe that the suspect has committed any crime involving the infliction or threatened infliction of serious physical harm.

Under these circumstances deadly force may also be used if necessary to prevent escape from the officer, where, if feasible, some warning is given, provided the officer meets the good faith standard of this section.

(3) A public officer ((~~or peace officer~~)) covered by subsection (1)(a) of this section shall not be held criminally liable for using

deadly force without malice and with a good faith belief that such act is justifiable pursuant to this section.

(4) A peace officer shall not be held criminally liable for using deadly force in good faith, where "good faith" is an objective standard which shall consider all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

(5) This section shall not be construed as:

(a) Affecting the permissible use of force by a person acting under the authority of RCW 9A.16.020 or 9A.16.050; or

(b) Preventing a law enforcement agency from adopting standards pertaining to its use of deadly force that are more restrictive than this section.

## PART VII
## MISCELLANEOUS

NEW SECTION. **Sec. 8.** The provisions of this act are to be liberally construed to effectuate the intent, policies, and purposes of this act. Nothing in this act precludes local jurisdictions or law enforcement agencies from enacting additional training requirements or requiring law enforcement officers to provide first aid in more circumstances than required by this act or guidelines adopted under this act.

NEW SECTION. **Sec. 9.** (1) Except where a different timeline is provided in this act, the Washington state criminal justice training commission must adopt any rules necessary for carrying out the requirements of this act within one year after the effective date of this section. In carrying out all rule making under this act, the commission shall seek input from the attorney general, law enforcement agencies, the Washington council of police and sheriffs, the Washington state fraternal order of police, the council of metropolitan police and sheriffs, the Washington state patrol troopers association, at least one association representing law enforcement who represent traditionally underrepresented communities including the black law enforcement association of Washington, de-

escalate Washington, tribes, and community stakeholders. The commission shall consider the use of negotiated rule making.

(2) Where this act requires involvement of community stakeholders, input must be sought from organizations advocating for: Persons with disabilities; members of the lesbian, gay, bisexual, transgender, and queer community; persons of color; immigrants; non-citizens; native Americans; youth; and formerly incarcerated persons.

NEW SECTION. **Sec. 10.** Except as required by federal consent decree, federal settlement agreement, or federal court order, where the use of deadly force by a peace officer results in death, substantial bodily harm, or great bodily harm, an independent investigation must be completed to inform any determination of whether the use of deadly force met the good faith standard established in RCW 9A.16.040 and satisfied other applicable laws and policies. The investigation must be completely independent of the agency whose officer was involved in the use of deadly force. The criminal justice training commission must adopt rules establishing criteria to determine what qualifies as an independent investigation pursuant to this section.

NEW SECTION. **Sec. 11.** Whenever a law enforcement officer's application of force results in the death of a person who is an enrolled member of a federally recognized Indian tribe, the law enforcement agency must notify the governor's office of Indian affairs. Notice by the law enforcement agency to the governor's office of Indian affairs must be made within a reasonable period of time, but not more than twenty-four hours after the law enforcement agency has good reason to believe that the person was an enrolled member of a federally recognized Indian tribe. Notice provided under this section must include sufficient information for the governor's office of Indian affairs to attempt to identify the deceased person and his or her tribal affiliation. Nothing in this section requires a law enforcement agency to disclose any information that could compromise the integrity of any criminal investigation. The governor's office of Indian affairs must establish a means to receive the notice required under this section, including outside of regular business hours, and must immediately notify the tribe of which the person was enrolled.

NEW SECTION. **Sec. 12.** A new section is added to chapter 9A.16 RCW to read as follows:

(1) When a peace officer who is charged with a crime is found not guilty or charges are dismissed by reason of justifiable homicide or use of deadly force under RCW 9A.16.040, or by reason of self-defense, for actions taken while on duty or otherwise within the scope of his or her authority as a peace officer, the state of Washington shall reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense. This reimbursement is not an independent cause of action.

(2) If the trier of fact makes a determination of justifiable homicide, justifiable use of deadly force, or self-defense, the judge shall determine the amount of the award.

(3) Whenever the issue of justifiable homicide, justifiable use of deadly force, or self-defense under this section is decided by a judge, or whenever charges against a peace officer are dismissed based on the merits, the judge shall consider the same questions as must be answered in the special verdict under subsection (4) of this section.

(4) Whenever the issue of justifiable homicide, justifiable use of deadly force, or self-defense under this section has been submitted to a jury, and the jury has found the defendant not guilty, the court shall instruct the jury to return a special verdict in substantially the following form:

| | answer yes or no |
|---|---|
| 1. Was the defendant on duty or otherwise acting within the scope of his or her authority as a peace officer? | ..... |
| 2. Was the finding of not guilty based upon justifiable homicide, justifiable use of deadly force, or self-defense? | ..... |

(5) Nothing in this section precludes the legislature from using the sundry claims process to grant an award where none was granted under this section or otherwise where the charge was dismissed prior

to trial, or to grant a higher award than one granted under this section.

NEW SECTION. **Sec. 13.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 14.** Sections 10 and 11 of this act constitute a new chapter in Title 10 RCW.

NEW SECTION. **Sec. 15.** For constitutional purposes, the subject of this act is "law enforcement."

NEW SECTION. **Sec. 16.** This act is the alternative to Initiative 940, which has been proposed to the legislature. The secretary of state is directed to place this act on the ballot in conjunction with Initiative 940, pursuant to Article II, section 1(a) of the state Constitution."

**ESHB 3003** - S AMD **956**
By Senator Padden

**NOT ADOPTED 03/08/2018**

On page 1, line 1 of the title, after "enforcement;" strike the remainder of the title and insert "amending RCW 9A.16.040; adding new sections to chapter 43.101 RCW; adding a new section to chapter 36.28A RCW; adding a new section to chapter 9A.16 RCW; adding a new chapter to Title 10 RCW; creating new sections; and providing for submission of this act to a vote of the people."

EFFECT: Incorporates the changes made by ESHB 3003 to I-940 into an alternate version of I-940; designates the act as an alternative to I-940, requiring it to be placed on the ballot along with I-940.

**--- END ---**

## CERTIFICATE OF SERVICE

I certify that on April 17, 2018, I served the foregoing via email per agreement between the parties on the following:

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I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

DATED this 17th day of April, 2018.

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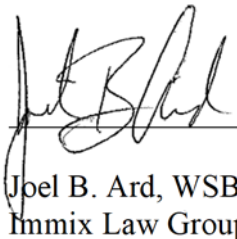
By 

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